In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1527

JOHN P. DOHERTY, ET AL.,
INTERVENORS-PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-RESPONDENTS,

and

JOHN J. McDONOUGH, ET AL.,
DEFENDANTS-RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

LAURENCE S. FORDHAM, J. HAROLD FLANNERY,
JOHN LEUBSDORF
(FOLEY, HOAG & ELIOT);
ROBERT PRESSMAN, ERIC E. VAN LOON
(CENTER FOR LAW & EDUCATION);
RUDOLPH F. PIERCE
(KEATING, PERRETTA & PIERCE);
NATHANIEL R. JONES (N.A.A.C.P.)
FOLEY, HOAG & ELIOT
10 Post Office Square, Boston, Mass. 02109

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

Table of Authorities

Cases

Other Authorities

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1527

JOHN P. DOHERTY, ET AL.,
INTERVENORS-PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-RESPONDENTS,
and
JOHN J. McDONOUGH, ET AL.,
DEFENDANTS-RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

The plaintiffs-respondents Tallulah Morgan, et al., black parents and their children attending the Boston public schools, oppose the petition for certiorari.

Statement of the Case

This Petition seeks review of relief for systematic hiring discrimination which had rendered the permanent teaching staff of the Boston public schools 95% white. That discrimination was part of a system-wide Constitutional violation which also included teacher segregation, student segregation, and denials of equal educational opportunity. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 456-66 (D. Mass.), *aff'd*, 509 F.2d 580, 595-98 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The District Court ordered that — to the extent qualified black teachers are available — they receive half of the available teacher positions until 20% of the teaching staff is black (App. 22-30). The Court of Appeals affirmed the District Court's remedial order (App. 13-21), and the Boston Teachers Union petitions for further review here.

The District Court's goal of a 20% black teaching staff roughly equals the percentage of black people in the Boston population (App. 14). It is substantially less than the percentage of black students in the Boston public schools, which is about 35% (App. 23). In the District Court, the Union (petitioner here) and school officials argued that the appropriate goal was about 4-5%, a figure rejected by the District Court because (*inter alia*) it was *less* than the percentage of black teachers already employed in the Boston schools and wholly inconsistent with the Court's previous violation findings (App. 16-17, 24-25). In the Court of Appeals, the Union shifted its position and suggested that a 12% goal was appropriate, arguing that blacks constitute about 12% of the "pool" of those qualified for teaching positions (App. 17). The Court of Appeals noted that the 12% figure had not been suggested to the District Court and was not supported by the record, concluding that "the union simply has not

presented a convincing case that blacks in fact constitute 12 percent of the pool as so defined" as opposed to 20% (App. 17). The Court of Appeals thus did not deny the possible relevance of "pool" statistics, but found the Union's evidentiary showing unpersuasive.[1]

The District Court's relief instituted a hiring goal, not a quota: only to the extent that *qualified* black applicants are available are the defendants required to hire one of them for each white teacher hired, until a 20% teaching staff is attained (App. 29). No black teacher is deemed qualified for a permanent post[2] unless he or she possesses Massachusetts certification, which in turn requires a college degree, specified courses, and student teaching experience (App. 29, 35; Record Appendix on Appeal, p. 228). In some instances, even a certified teacher need not be hired unless he or she has taken certain additional courses (App. 29 n. 5). And the defendants may reject any black candidate after an interview if reasons are specified (App. 20, 27).

The defendants have at no time proposed any alternative hiring system which is even validated under the principles of *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425-36 (1975), much less one promising realistically to remedy the effects of past discrimination. In the District Court, the defendants argued that there were already more than enough black teachers (App. 16-17, 24). The present petition does not state what form of relief the Union would consider acceptable.

---

[1] In this Court, the Union does not advance *any* specific percentage as the appropriate goal for relief, though it does mention in passing (p. 5) still a third figure, 13%.

[2] Like the Petition (p. 4 n. 1), this brief will not discuss provisional teachers.

Argument

I. This Is an Inappropriate Case to Consider Percentage Relief for Hiring Discrimination.

Even should the Court be disposed to deal with the scope and propriety of hiring ratio relief for employment discrimination, this is not the case in which to do it.

First, this is a school segregation case, not just a hiring discrimination case, and conclusions in this case may not be generally applicable. Black children have a strong interest in attending a school system free of faculty discrimination (*Rogers* v. *Paul,* 382 U.S. 198 (1965)), and in attending such a school system *now* (e.g., *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 13-14, 19-20 (1971)). For this reason and others discussed in part III below, it is vital that relief for teacher hiring discrimination have a substantial immediate effect, which hiring ratios are particularly suited to do.

Second, this is an unusual hiring discrimination case because it arises under the Fourteenth Amendment, and not under Title VII of the Civil Rights Act of 1964. After this suit was filed, Title VII was amended to include government employees (42 U.S.C. § 2000e(a); P.L. 92-261, § 2(1)), so that future cases will not be similarly limited. In this case, the Court would not be able to limit its decision to a statutory ground. Nor would it have before it section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), and the legislative history bearing on the propriety of hiring ratio relief. See, e.g., *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *United States* v. *Local Union No. 212,* 472 F.2d 634, 636 (6th Cir. 1973).

Third, the Union and its officers lack standing to seek review.[3] The order is not addressed to them, does not

---

[3] This point was not raised below, but may nevertheless be considered here. See *Sosna* v. *Iowa,* 419 U.S. 393, 397-403 (1975).

deprive them of their jobs, and does not impair their collective bargaining agreement, which does not regulate hiring standards. It is true that the order may impair the chances of some white provisional teachers in the bargaining unit to obtain permanent employment, but by the same token it increases the chances of black provisionals to obtain such employment. (A provisional is an untenured teacher hired on a one-year contract.) The Union cannot represent the interests of white provisionals when it owes an equal duty to black provisionals. See *Warth* v. *Seldin*, 422 U.S. 490, 502, 510-14 (1975); *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Steele* v. *Louisville & N. Ry.*, 323 U.S. 192 (1944); *Air Line Stewards* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Mass. G.L. c. 151, § 4(2). The Boston School Committee, to which the District Court's order was addressed, did not appeal.

II. The 20% Hiring Goal Was Not an Abuse of Discretion and Raises No Issue Warranting Review.

Selecting a particular percentage of minority employees as the goal for hiring discrimination relief is necessarily within the District Court's discretion. It is simply impossible to lay down one final formula for relief. A great variety of factors — the nature and extent of the violation, the minority percentage in the local population, special features of the working force, the requirements of the job, the practicability of relief, the other characteristics of the remedial order, the order's impact on various groups, and so on — may be relevant.[4] The choice of a

---

[4] This case does not raise the question of whether lower court discretion should be directed in the way set forth in *Franks* v. *Bowman Transp. Co.*, 44 U.S.L.W. 4356 (1976) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975).

specific figure must be left to the District Court with review only for abuse of discretion.

It is impossible to find an abuse of discretion here, much less an issue warranting review by this Court. The 20% goal established by the District Court coincided with the percentage of black people in Boston, and was thus consistent with the numerous cases which have used goals roughly equalling the local minority population. App. 15-16 (citing cases); *Crockett* v. *Green,* 12 F.E.P. Cas. 1078 (7th Cir. 1976); *Erie Human Relations Comm'n* v. *Tullio,* 493 F.2d 371, 374-75 (3rd Cir. 1974); *Arnold* v. *Ballard,* 390 F. Supp. 723, 726, 736 (N.D. Ohio 1973); *Dozier* v. *Chupka,* 395 F. Supp. 836, 860 (S.D. Ohio 1975); *Davis* v. *County of Los Angeles,* 8 F.E.P. Cas. 239, 242 (C.D. Calif. 1973); *Reed* v. *Lucas,* 11 F.E.P. Cas. 153, 156 (E.D. Mich. 1975).

The union's argument that blacks compose less than 20% of the "pool" of qualified applicants was not held irrelevant below; it was rejected on the facts for insufficiency of evidence (App. 16-17), leaving no issue for review here. In the District Court, the Union and School Committee argued that no goal above 5% would be proper (App. 16-17). This theory was properly rejected, since it "would have entirely nullified the court's previous findings of constitutional violations in the recruitment and hiring of faculty, as the percentage of black teachers in the Boston system had already exceeded 7 percent in 1972-73 and the Committee's proposed goals would have permitted backtracking rather than constituting remedial relief" (App. 16-17; see 24). The 5% theory — typical of the defendants' defaults when it came to proposing relief (509 F.2d 618; 401 F. Supp. 216, 224-29) — came with particular inappropriateness from the Union, since the terms of its intervention forbid it to relitigate the violation findings in this case (App. 31).

The Union's suggestion in the Court of Appeals that analysis of the "pool" might support a hiring goal of 12% was not only untimely (App. 16-17) but factually unfounded. The Union derived its 12% figure from the estimated percentage of the current nationwide college population which is black (Petition, p. 5; App. 17). But, as Chief Judge Coffin explained (App. 17):

> "This figure, however, is also approximately the same as the percentage of blacks in the national population (11 percent). Since there is a higher percentage of blacks in the Boston area, it is likely that there is also a higher percentage of black college students and recent graduates. The union advances no indication that a lower proportion of college students and recent graduates exists in the Boston area black population than nationally."

It cannot avail the Union to cite (Petition, p. 6) statistics on the number of recently certified Massachusetts teachers without jobs, since there is no evidence of their race. Nor does it help to cite (p. 5) data on the percentage of blacks in various groups of people 25 years old or more in 1970, since teachers are hired in Boston from among recent college graduates and the percentage of college students who are black has been rising. These are simply attempts to relitigate here factual matters decided adversely to the Union below.

The 20% goal was especially appropriate here since it came as part of desegregation relief in a school system whose students are 35% black (App. 23). It is difficult to remedy intertwined constitutional violations which sidetracked black people at every level of the system when the faculty remains 90% white (App. 23). Even in the absence of proof of hiring discrimination, some desegregation

courts have acted to increase (*Davis* v. *School Dist. of Pontiac*, 474 F.2d 46, 487 F.2d 890 (6th Cir. 1973); *Smith* v. *St. Tammany Parish School Bd.*, 448 F.2d 414 (5th Cir. 1971)) or stabilize (e.g., *Singleton* v. *Jackson Munic. Sep. School System*, 419 F.2d 1211 (5th Cir.), *rev'd in other respects*, 396 U.S. 290 (1969)) the number of black staff members. Other courts have used the percentage of minority students as a benchmark for appraising hiring discrimination claims or shaping relief. App. 15 (citing cases); see *Jackson* v. *Wheatley School Dist.*, 430 F.2d 1359, 1363 (8th Cir. 1970); *Porcelli* v. *Titus*, 431 F.2d 1254, 1257-58 (3rd Cir. 1970). The courts here stopped well short of that percentage.

The 20% goal, lastly, was thoroughly practicable. Experience with interim relief during the summer of 1974 showed that even a hasty, one-month attempt could increase the percentage of black teachers from 7.1% to 10.4% (App. 18, 23).[5] Undisputed evidence shows, moreover, that in many cities even outside the South (where black schools were usually staffed entirely by blacks) the percentage of black teachers is at least as high as the percentage of blacks in the local population. See Appendix to this brief. Where two lower courts have found a 20% goal feasible and equitable, there is no occasion for this court to resift the record in order to review what amounts to a claim that the lower courts found certain factual inferences from 1970 census data less persuasive than the Union wishes appropriate. Since the factual premises of

---

[5] The 7.1% starting figure includes provisional teachers, and hence differs from the 5% figure used elsewhere in this brief (see App. 24 & n. 2). The Petition (p. 6), incidentally, improperly refers to 1975 hiring experiences which occurred *after* the hiring order was entered, and which in any event prove only the School Committee's poor compliance. The order's requirement of two assistant recruiters (App. 27-28) was not complied with until four months after the order issued, and even then only after a second order.

the Union's claim were rejected below, and since the choice of a particular percentage goal was in any event within the Court's discretion, certiorari should be denied.

III. The Use of Hiring Ratios to Remedy Constitutional Violations Presents No Issue Warranting Review in This Case.

When employment discrimination has been shown, many courts have upheld the use of hiring ratios as a remedial measure. E.g., *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 504 F.2d 1017, 1026-28 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Rios* v. *Enterprise Assoc. Steamfitters,* 501 F.2d 622 (2d Cir. 1974); *Erie Human Relations Comm'n* v. *Tullio,* 493 F.2d 371 (3rd Cir. 1974); *Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir. 1974) (*en banc*), *cert. denied,* 419 U.S. 895 (1975); *United States* v. *Masonry Contractors Ass'n,* 497 F.2d 871, 877 (6th Cir. 1974); *Crockett* v. *Green,* 12 F.E.P. Cas. 1078 (7th Cir. 1976); *Carter* v. *Gallagher,* 452 F.2d 315, 327-31 (8th Cir. 1971) (*en banc*); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 552-53 (9th Cir. 1971) (*affirming* 315 F. Supp. 1202, 1247).

Such relief complies with the principle that "the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *United States* v. *Louisiana,* 380 U.S. 145, 155-56 (1965); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975). This is not a case in which "affirmative action" programs have been instituted without a showing of past discrimination. Cf. *De Funis* v. *Odegaard,* 416 U.S. 312 (1974); *Morton* v. *Mancari,* 417 U.S. 535 (1974) (employment preference for certain Indians upheld). Here, as a result of systematic discrimination (379 F. Supp. at 456-66) linked with other Constitutional violations, 95%

of the permanent teaching positions had been preempted by white employees before relief began (App. 24). All the District Court did was to require that, to the extent new vacancies appear and *qualified* black applicants are found, they receive half the available openings until black teachers constitute a reasonable proportion of the staff. (For an outline of the required qualifications, see Statement of the Case, above.) The goal was simply to undo the effects of past discrimination. Cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 19-20, 22-25 (1971); *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

This case did not require the courts to balance equities between black applicants and white employees hired under the discriminatory system, since the employment and seniority of those already hired were not affected. Eliminating the effects of discrimination could be accomplished without harm to white beneficiaries of that discrimination. Compare *Franks* v. *Bowman Transp. Co.*, 44 U.S.L.W. 4356 (1976). The courts also considered the effect of the order on white applicants who had merely a hope of employment (App. 18):

> "The goal set by the court has no deadline date. As the court recognized, it contemplates 'a gradual increase in the number of black teachers over several years'. The prospect of placing 500 additional black teachers in a teaching force of over 5,000 over several years does not seem to us to place an undue burden on the non-minority labor force."

That this is a school desegregation case made vigorous affirmative relief particularly appropriate. Students are entitled to a teaching force free of discrimination now, not years after they graduate. See *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Swann*, 402 U.S. at 18-20. Children and

parents should not be left to meet the challenges of desegregation with an overwhelmingly white staff whose composition is itself the effect of past discrimination.

In this case, moreover, there were no effective alternatives to the use of hiring ratio relief. Boston's previous hiring system focused on an examination whose discriminatory potential has been widely condemned.[6] That system had been held unconstitutional by the District Court (379 F. Supp. at 463-65) and Court of Appeals (509 F.2d 580, 596-98 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975)). No validated alternative system was presented. There was not even an assertion that one was in process of development or validation. The defendants argued that there were already more than enough black teachers (App. 16-17, 24). "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." *Swann*, 402 U.S. at 16. All reasonable means were available to the court. *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4484 (1976).

The Boston School Committee's recalcitrance and evasion, finally, made objective and enforceable remedial standards essential. The School Committee had sabotaged its own minority recruitment program (379 F. Supp. at 464-65). Its proposed remedial goal "would have entirely nullified the court's previous finding of constitutional violations in the recruitment and hiring of faculty . . . and . . . would have permitted backtracking rather than constituting remedial relief" (App. 16-17). Its persistent obstruction of desegregation measures had culminated in

---

[6] *Walston* v. *County School Bd.*, 492 F.2d 919 (4th Cir. 1974); *Baker* v. *Columbus Munic. Sep. School Dist.*, 462 F.2d 1112 (5th Cir. 1972); *United States* v. *North Carolina*, 400 F. Supp. 343 (N.D. Cal. 1975) (three-judge court); *Georgia Assoc. of Educators, Inc.* v. *Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976) (three-judge court).

contempt of court only a few weeks before the hiring order issued. 379 F. Supp. at 418-20, 430-32, 440-41, 450-55, 476-77; *Morgan* v. *Kerrigan,* 401 F. Supp. 216, 224-29 (D. Mass. 1975), *aff'd,* —— F.2d —— (1st Cir. 1976) (No. 75-1184), *petitions for cert. pending* (Nos. 75-1441, 75-1445, 75-1466); *Morgan* v. *Kerrigan,* 509 F.2d 618 (1st Cir. 1975). Its members openly avowed that they would do nothing not specifically ordered by the Court. 401 F. Supp. at 226; *Morgan* v. *Kerrigan,* —— F.2d —— (1st Cir. 1976) (No. 75-1184) (slip opinion at 43-44). To have given these officials anything but a precise and enforceable mandate would have been entrusting the cabbage patch to the goat.

Conclusion

The District Court's hiring order (App. 22-30) was just part of complex relief designed to deal with a complex constitutional violation involving every part of the Boston public schools. See *Morgan* v. *Hennigan,* 379 F. Supp. 410 (D. Mass.), *aff'd,* 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975) (violation findings). Relief has been resisted every step of the way, as the petitions seeking review here can attest (Nos. 75-1441, 75-1445, 75-1466). The present petition concentrates on the particular percentage goal for black teachers set by the District Court — a matter plainly within its discretion, in which the Union first sought improper relitigation of the violation findings (App. 16-17), then shifted its position on appeal (App. 17), and now wishes this Court to review the finding that "the union simply has not presented a convincing case" (App. 17) for the factual claims on which its arguments rest. On such a record, no issue of law warranting this Court's attention can be erected. As for the District Court's use of hiring ratio relief,

such relief is supported by extensive precedent, is peculiarly appropriate in a desegregation case in which the local school authorities have obstructed relief, and was almost compelled here by the absence of alternatives. More basically, the absence of Title VII grounds in this case and its desegregation context make it an unsuitable vehicle for approaching the issues of hiring ratio relief, even should this Court now wish to confront those issues. The courts close to the situation have carefully fashioned relief appropriate to the pervasive violation; there is no occasion for further review by this Court.

Respectfully submitted,

LAURENCE S. FORDHAM, J. HAROLD FLANNERY,
JOHN LEUBSDORF
(FOLEY, HOAG & ELIOT);
ROBERT PRESSMAN, ERIC E. VAN LOON
(CENTER FOR LAW & EDUCATION);
RUDOLPH F. PIERCE
(KEATING, PERRETTA & PIERCE);
NATHANIEL R. JONES (N.A.A.C.P.)

FOLEY, HOAG & ELIOT
10 Post Office Square, Boston, Mass. 02109

APPENDIX

*Nonsouthern cities in which the percentage of black teachers is comparable to the percentage of black people in the population.**

	Population % Black	*Teacher % Black*
Baltimore	46.4	56.5
Chicago	32.7	34.2
Cleveland	38.3	38.2
Detroit	43.7	41.4
District of Columbia	71.1	79.5
Gary	52.8	59.6
Indianapolis	18.0	22.7
Kansas City, Mo.	22.1	34.5
Philadelphia	33.6	32.2
St. Louis	40.9	53.4

* These statistics come from an exhibit based on Census and Department of Health, Education and Welfare data for 1970. This uncontradicted exhibit (Court of Appeals Record Appendix, pp. 133-34) also includes data on 12 similar Southern cities.